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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~281.~~

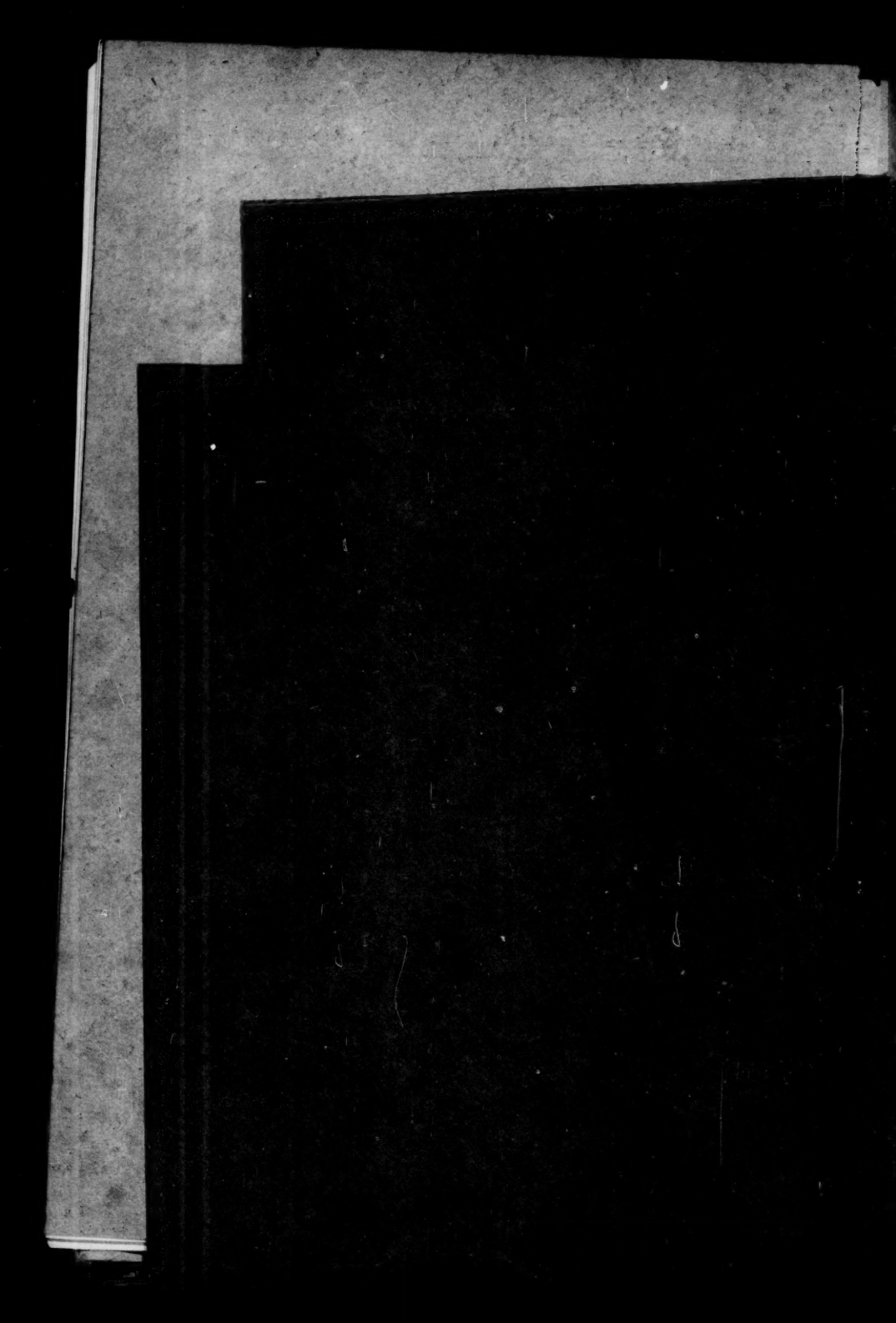
SAMUEL C. COOK, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

FILED OCTOBER 1, 1874.



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1 The return of the justices of the supreme court of the commonwealth of Pennsylvania to the writ of error from the Supreme Court of the United States, hereunto annexed, as follows, to wit:

2 DOCKET ENTRIES.—COURT OF COMMON PLEAS.

Among the records of the court of common pleas of Dauphin County, Pennsylvania, to April term, 1871, No. 412, it is contained as follows, to wit:

Docket entry.

THE COMMONWEALTH OF PENNSYLVANIA
vs.
SAMUEL C. COOK. } 412. March 31, 1871.

Appeal by defendant from the settlement of the auditor-general & state treasurer.

March 31, 1871, appeal & specifications of objections, &c., filed.
April 4, 1871, bond filed.
June 14, 1871, narr. & copy of account filed; same day rule to plead on thirty days' notice or judgment ex. rule.
June 16, 1871, defendant pleads "nil debit payment with leave, &c.;" see file.
October 25, 1871, case stated, filed November court, 1871. A. L.
Apl. 29, 1872, opinion of court filed.
May 16, 1872, assessment of damages, as per statement filed, eight hundred & ninety-seven & $\frac{87}{100}$ dollars, (897.87.)
July 5, 1872, writ of error from the Supreme Court received and filed.

DAUPHIN COUNTY, *ss:*

Certified from the record. Harrisburg, Aug. 30, 1872.
[SEAL.] JOS. H. NISLEY,
Prothy.

3 In the matter of the account settled January 31, 1871, by the auditor-general and State treasurer of the Commonwealth of Pennsylvania between The Commonwealth of Pennsylvania and Samuel C. Cook, auctioneer, Philadelphia, for the amount claimed to be due by the said Samuel C. Cook, under the act of the general assembly of this commonwealth entitled "An act to incorporate the Commercial Mutual Insurance Company of Philada., relative to the State duty on domestic and foreign articles in the counties of Philada. and Allegheny, authorizing the borough of New Brighton to borrow money; relative to monies paid into courts of Bucks Co.; authorizing the associate congregation of the city of Philada. to sell certain real estate to turnpike or plank roads in Germantown, Phila. Co., to the North Branch Coal and Iron Co.; to the trust-estate of Eliza Farquhar; authorizing the Tioga Railroad Co. to borrow money, and relative to the estate of Andrew Calleby, late of the city of Philada.," approved the 20th day of May, A. D. 1853, and under the act of the general assembly of this commonwealth, entitled "An act to modify the existing auction laws of the commonwealth, and to provide more effectually for the collection of the State tax or duty on auction-sales in the city of Phila. & co. of Allegheny," approved the 9th day of April, A. D. 1859.

Samuel C. Cook enters an appeal from the said settlement (a copy

whereof is hereto annexed) of the auditor-general and State treasurer of the commonwealth of Pennsylvania to the court of common pleas of Dauphin County, pursuant to the provisions of the act of assembly of
4 the State of Pennsylvania for such case made & provided, and files the following specifications:

That the said acts of the general assembly of this commonwealth, insomuch as they impose a tax upon the sale of foreign and imported goods by auctioneers, in bulk, as imported, and before they, the said goods, have passed into the mass of general property and lost their character of imports, either by being sold by the importer for consumption or resale, or by being divided by him into smaller quantities by breaking up the casks or packages in which they were imported, are in direct conflict with sections eight (8) and ten (10) of article 1 of the Constitution of the United States, and the said acts are for this and other reasons unconstitutional and void.

BENJAMIN HARRIS BREWSTER,
Atty. for S. C. Cook.

SAML. C. COOK.

Filed in auditor-general's office March 31, 1871.
Filed in Dauphin com. pleas March 31, 1871.

5 *Saml. C. Cook, auctioneer, Philadelphia, in account with the Commonwealth of Pennsylvania, Dr.*

AUCTION DUTIES.

To amount of said duties received from March 1st, 1868, to Nov. 30th, 1870, as per reports herewith filed.....$3,032 03

CR.

By payments into State treasury, viz:

Nov., 1868	$860 97	
May, 1869	564 04	
Oct., 1869	600 00	
April, 1870	248 77	2,274 20
Balance due commonwealth		$757 83

AUDITOR-GENERAL'S OFFICE,
Harrisburg, Jany. 31, 1871.

Settled and entered.

J. F. HARTRANFT,
Auditor-General.

TREASURY OFFICE, PA.,
Harrisburg, Jany. 31, 1871.

Approved:

W. B. HART,
For W. W. IRWIN,
State Treasurer.

AUDITOR-GENERAL'S OFFICE,
Harrisburg, Jany. 31, 1871.

I hereby certify that the above is a true copy of the original remaining on file in this deparment.

Witness my hand and the seal of office the day and year aforesaid.
[SEAL.] J. F. HARTRANFT,
Auditor-General.

6 *Bond.*

We, Samuel C. Cook and Thomas Alexander, of Philadelphia, severally acknowledge to owe & be indebted to the Commonwealth of Pennsylvania, in the sum of one thousand five hundred & fifteen dollars and sixty-six cents, ($1,515.66,) lawful money of the United States of America, of our respective goods & chattels, lands & tenements, to be made and levied if default be made in the following condition :

Whereas the said Samuel C. Cook has appealed from the settlement of the auditor-general and State treasurer of an alleged claim or account for money claimed by the said commonwealth from the said Samuel C. Cook (which settlement was made on the 31st day of January, A. D. 1871) to the court of common pleas of Dauphin County :

Now if the said Samuel C. Cook shall prosecute the said appeal with effect, & pay all costs & charges which court or arbitrators shall award, and also pay any sum of money which shall appear by the judgment of said court or award of arbitrators to be due by him to the said commonwealth, then this recognizance to be null and void, otherwise to be in full force and virtue.

In witness whereof we have hereunto set our hands and seals
7 this first day of April, A. D. 1871.

SAML. C. COOK. [SEAL.]
THOMAS ALEXANDER. [SEAL.]

Taken & acknowledged before the president judge of court of com mon pleas, Dauphin Co.

The above security approved by me.

WM. S. PIERCE,
Judge Court Common Pleas County of Philadelphia.

(Endorsed :) 412. Apl. t., 1871. Comm'lth of Penna. vs. S. C. Cook. Bond. Filed April 4, 1871, in Dauphin common pleas.

APRIL 3, 1871.

The within bond approved and ordered to be filed.

JNO. J. PEARSON,
Prest. Judge.

8 *Samuel C. Cook, auctioneer, Phila., in account with the Commonwealth of Pennsylvania, Dr.*

AUCTION DUTIES.

To amount of said duties received from March 1st, 1868, to Nov. 30, 1870, as per report herewith filed..... $3,032 03

CR.

By payments into State treasury:

Nov., 1868	860 97	
May, 1869	564 04	
Oct., 1869	600 42	
Apl., 1870	248 77	
		2,274 20
Due Com'lth		$757 83

AUDITOR-GENERAL'S OFFICE,
Harrisburg, Jany. 31, 1871.

Settled and entered.

J. F. HARTRANFT,
Auditor-General.

TREASURY OFFICE, PA.,
Harrisburg, Jan. 31, 1871.

Approved.

W. B. HART,
For W. W. IRWIN,
State Treasurer.

AUDITOR-GENERAL'S OFFICE,
Harrisburg, June 13, 1871.

I hereby certify that the above is a true copy of the original remaining on file in this department.

Witness my hand and the seal of office the day and year aforesaid.

[SEAL.] J. F. HARTRANFT,
Auditor-General.

9 In Dauphin common pleas. No. 412. April term, 1871.

DAUPHIN COUNTY, *ss:*

The Commonwealth of Pennsylvania, by her attorney-general, complains of Samuel C. Cook, *company*, of a plea that he render unto the said Commonwealth the sum of one hundred thousand dollars, lawful money of the United States, which he owes to and unjustly detain' from her. For that whereas the said defendant on the 31st day of January, A. D. 1871, at the county of Dauphin aforesaid, was indebted to the said plaintiff in the sum of seven hundred & fifty-seven and $\frac{83}{100}$ dollars, lawful money of the United States, on an account examined, adjusted, settled, and signed by the auditor-general of this Commonwealth, and duly entered in the books of his office, as authorized and required by law, on the day and year last aforesaid, in which a certain sum of money, to wit, the sum last aforesaid, is due and owing the said plaintiff from the said defendant, with interest thereon at the rate of twelve per centum per annum, from and after the expiration of 60 days from the day upon which the said account was so as aforesaid examined, adjusted, settled, and signed by the auditor-general of this Commonwealth, for auction duties from March 1, 1868, to November 30th, 1870, which said account was, on the 31st day of January, A. D. 1871, submitted to, revised, and approved by the State treasurer, and a copy thereof within thirty days thereafter sent by the said auditor-general, under his hand and seal of

office, to the said defendants, and which yet remains in full force against the said defendant. Whereby, and by force of the statute in such case made and provided, an action hath accrued to the said plaintiff to demand and have of and from the said defendant a certain sum of money, to wit, the sum mentioned and ascertained to be due to this Commonwealth in the said account so as aforesaid examined, adjusted, settled, and signed by the auditor-general of this Commonwealth, parcel of the said sum above demanded. And being so indebted, the said defendant afterward, to wit, on the day and year aforesaid, at the county aforesaid, promised to pay to the said plaintiff, on request, the said last-mentioned sum of money;

And whereas, also, the said defendant, on the day and year in the first count first mentioned, at the county aforesaid, was indebted to the said plaintiff in a certain further sum of money, to wit, the sum mentioned and ascertained to be due to this Commonwealth in the said account in the first count mentioned, for money then and there had and received by the said defendant to and for the use of the said plaintiff; and also a certain further sum of money, to wit, the sum last aforesaid, on an account settled and entered by the auditor-general of this Commonwealth against the said defendant, on the day and year in the first count mentioned, for auction-duties, and approved by the State treasurer on the day and year in the first count mentioned;

And whereas, afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, the said defendant, in consideration of the premises, promised to pay the two last-mentioned several sums of money, respectively, to the said plaintiff on request; yet the said defendant has disregarded his said promises, and although often requested so to do, has not as yet paid any of the said several sums of money or any part thereof; to the damage of the said plaintiff of one hundred thousand dollars, and therefore she brings suit, &c.

J. M. McCLURE,
For F. CARROLL BREWSTER,
Attorney-General.

(Endorsed:) No. 412. April term, 1871. Commonwealth of Pennsylvania vs. Samuel C. Cook. Narr. and copy of account. Filed June 14, 1871.

In the court of common pleas of Dauphin Co.

THE COMMONWEALTH OF PENNSYLVANIA
vs.
SAMUEL C. COOK. } No. 412. April t., 1871.

Defendant pleads nil debit, payment with leave, &c.

BENJAMIN HARRIS BREWSTER,
Per E. McL., *for Deft.*

To prothy. C. P. Dauphin Co.

Case stated.

And now, January 27, A. D. 1872, it is hereby agreed by and between the parties to the above suit that the following case be stated for the opinion of the court in the nature of a special verdict:

That the Commonwealth of Pennsylvania claims from Samuel C. Cook, an auctioneer duly appointed and commissioned by the governor in and for the city of Philadelphia, the sum of $757.83 for taxes due at one-half of one per cent. and three-fourths of one per cent., as per his re-

port furnished to the auditor-general and settlement made by the auditor-general and State treasurer, dated January 3, 1871, upon sales made by him of foreign goods placed in his hands by the importer, in bulk or original packages, to be sold at auction as an auctioneer in the original packages as imported, and which were so sold by him at auction as an auctioneer. The Commonwealth claims the said taxes under the act of assembly entitled "An act to incorporate the Commercial Mutual Insurance Company, of Philadelphia, relative to the State duty on domestic and foreign articles in the counties of Philadelphia and Allegheny, &c.," approved the 20th day of May, A. D. 1853, P. L. 1853, p. 679; and under the act of assembly entitled "An act to modify the existing laws of the Commonwealth, and to provide more effectually for the collection of the State tax or duty on auction sales in the city of Philadelphia and county of Allegheny," approved April 9, 1859, P. L. 1859, p. 435.

The defendant claims that said sales of foreign goods are exempt from taxation, because said acts of assembly, so far as they relate to such taxation, are in direct conflict with sections 8 and 10 of Article I of the Constitution of the United States, and for that and other reasons void, and inasmuch as the foreign goods so taxed as aforesaid were sold in bulk, as they were imported by the importer, said defendant, Cook, acted simply as his salesman.

That as the said goods had never been sold for consumption or resale by the importer, and had never been divided by him into smaller quantities by breaking up the casks or packages in which they were originally imported, the said goods had not lost their character as imports, and therefore that any such tax is unconstitutional and ought not to be levied.

13 If the court is of the opinion that the acts of assembly are constitutional, then judgment to be entered for the Commonwealth, but if not, then judgment to be entered for the defendant, Cook; costs to follow the judgment & either party reserving the right to sue out a writ of error.

BENJAMIN HARRIS BREWSTER,
Of Counsel with Samuel C. Cook, the Defendant.
F. CARROLL BREWSTER,
Attorney-General.

Opinion of the court.

THE COMMONWEALTH OF PENNSYLVANIA
vs.
SAMUEL C. COOK.
412. April t., 1871.
Stated case.

By the court:

The case shows that the defendant was a commissioned auctioneer in the city of Philadelphia, and as such was charged with a tax on certain of his sales at the rate of ½ and ¾ of one per cent., according to the kind of goods sold. The claim was settled by the accounting department of the State, under the acts of the 20th of May, 1853, and the 9th of April, 1859, showing a balance due of unpaid taxes amounting to $757.83.

The defendant's excuse for non-payment is, that the sales were made for the importer of the goods, in the original packages, as brought in from foreign countries, and as the original importer could not be obliged to pay any tax had he sold the commodities himself, the defendant, as

his auctioneer or salesman, cannot be assessed with this tax, and that the acts of assembly imposing it come in conflict with the Constitution of the United States, which prohibits any State from imposing a tax or duty on imports or exports. Ever since the decision of Brown vs. The State of Maryland, 12 Wheaton, 419, it has been considered the settled law of the land that no State can in any form impose a tax on the sales of the importer of foreign merchandize who disposes of his goods in the original bale or package; not on the sales, for that would be an additional duty; nor on the goods themselves, for that would have the same effect; nor can it exact from him a license to sell, for that might be so high as to amount to a heavy burden or a prohibition. Possibly he might, in common with other citizens, be taxed on his net annual income. So soon as the goods have changed hands and gone into the common stock of the country, they are or their owner is subject to taxation in any of these forms; and so strictly has this principle been adhered to, that when the freight of a vessel was sold by the consignee before it was actually landed, the purchaser was not considered the original importer, but was obliged to take out a license to sell, (Waring vs. The Mayor, 8 Wallace, 110.) And where a commodity is considered dangerous or injurious, the State could prohibit its sale, as a police regulation. (See 5 Wallace, 462, 479.)

14

The assessment claimed in the present case is not from the original importer, but from the auctioneer employed to sell the goods.

By the laws of Pennsylvania no person can make sale of merchandize and certain other commodities, as an auctioneer, within the city of Philadelphia, without giving adequate security and obtaining a commission from the governor for that purpose. He is also bound by law to pay a certain tax or duty on his sales into the State treasury, and forfeits his commission by any neglect or refusal so to do. This was the law of the State long before the enactment of the two statutes referred to in the stated case, which merely increased the amount of said tax or duty on some kind of goods and took it off of others. When the importer, instead of making sales himself, chooses to employ a State officer for that purpose, who is obliged to pay a certain tax or commission on his sales, he himself would, perhaps, eventually be compelled to pay the same; at least he could not lend the immunity which he enjoyed as an importer to the auctioneer and shield him from payment according to the terms of his commission. In the case of Nathans vs. The State of Louisiana, 8 Howard, 73, an auctioneer who dealt solely in foreign bills of exchange was held to be subject to State taxation, and it was there decided that the State has a right to tax its own citizens for the prosecution of any particular business or profession within the State. In Brown vs. The State of Maryland, already cited, Ch. J. Marshal' says: "Auctioneers are persons licensed by the State, and if the importer chooses to employ them, he can as little object to paying for the service as for any other which he may apply to an officer of the State. The right of sale may very well be annexed to importation without annexing to it also the privilege of using the officers licensed by the State to make sales in a particular way." We do not understand that any of our statutes impose the tax or duty on the owner of the goods, but on the auctioneer, who is required to pay it into the State treasury. It is true that this duty may increase the expense of sale to the owner of the goods, but that is because he chooses to employ a State officer to make it. If he would conduct the business himself, that would be avoided. Nor does the loss necessarily fall on the owner. It may only diminish the profits of the auctioneer or increase the price of the purchaser. The

15

case does not state on whom the duty must fall, nor does it show that it is customary to sell at auction in such cases. If the importing merchant expected immunity under the Federal Constitution, the case should set forth that it was an established usage or custom, or that there was a pressing necessity to sell at auction.

We have been referred by the defendant's counsel to The People of New York vs. Maring, 3 Keys, 374, a well-reasoned opinion by the New York court of appeals, to show that a tax cannot be imposed on the goods or sales of an importing merchant until the articles have gone
16 into second hands. That case, however, at p. 376, shows pretty clearly that if the importer chooses to command the service of an auctioneer, who is a State officer, he cannot object to paying the tax or duty on a sale so made, and a distinction is there taken between a sale by a broker—a private agent—& one by the auctioneer, a commissioned officer of the State.

We referred this case back after it was submitted to have the counsel agree as to whether it was necessary for the importer to sell through the medium of an auctioneer, or whether there was a settled custom or usage in the city to so make sales; but no change was made in the statement. We must therefore take it for granted that it was done for mere convenience. As we conceive the State can as well require the auctioneer to pay a tax on his sales, as pay for his commission or license, there is no constitutional distinction. It can also declare by law that he shall pay that tax on certain commodities and not on others. That he may sell all drugs, dye-stuff, and salt, ad libitum, but shall pay a duty on all sales of woolen, cotton, or iron goods, or on groceries; as it creates the officer it can fix the terms of his being. No one is obliged to employ him, and if they do he must pay the tax on his sales, according to the terms of the law under which he holds his commission, whether that eventually falls on the seller, the purchaser, or himself. In no one of the cases decided is it said that a State cannot tax her own officers, whether they sell for others foreign or domestic goods. It is all a matter of State power and of State policy. We are of the opinion that the department properly charged the auctioneer with this tax; that the laws under which it was assessed are constitutional, and we therefore give judgment in favor of the Commonwealth on the case as stated.

JNO. J. PEARSON.
President Judge.

Filed April 29, 1872.

17 *Statement of claim.*

Court of common pleas, Dauphin County.

COMMONWEALTH *vs.* SAMUEL C. COOK. } No. 412. April t., 1871. Case stated.

Amount of claim	$8757 83
Int., at 12 per cent., from March 31, 1871, to May 16, 1872	102 19
5 per cent. commissions under act April 7, 1871	37 85
Due Commonwealth	$8897 87

To JOS. H. NISLEY, esq.,
Prothonotary.

JNO. C. KNOX, JR.,
Dept. Atty. Genl.

MAY 16, 1872.

18 In the supreme court of Pennsylvania in and for the middle district, sct.:

[SEAL.] The Commonwealth of Pennsylvania to the justices of the court of common pleas for the county of Dauphin, greeting:

Because in the record and process, and in rendering the judgment in a certain plaint, which was in our said court, before the judges of the same court, by our writ between Samuel C. Cook, plaintiff in error, and the Commonwealth of Pennsylvania, defendant in error, as it is said, manifest error hath intervened, to the great damage of the said plaintiff in error, as by the complaint of the same plaintiff in error we have received information, we, willing that if any error be therein, it should be corrected, and that speedy justice be done to the parties in this part, do command you, that if judgment, as it is said, be rendered in the said plea, then the record and process and all things touching the same, under your seals, distinctly and openly, you have before the justices of our supreme court of Pennsylvania, at a supreme court to be held at Harrisburg, in and for the middle district of said commonwealth, on the third Monday of May next, and this writ; that the record and process aforesaid being inspected, we may further cause to be done what of right and according to our laws and customs ought.

Witness the honorable James Thompson, LL. D., chief-justice of our said supreme court, at Harrisburg, the 2d day of July, in the year of our Lord one thousand eight hundred and seventy-two, and of the commonwealth the 96th.

ROBT. SNODGRASS, *Prothonotary.*

19 The record and process and all things touching the same, so full and entire as before us they remain, to the honorable the judges of the supreme court of the commonwealth of Pennsylvania, sitting in and for the middle district, we certify and send as within we are commanded.

JOHN J. PEARSON. [L. S.]

(Indorsed:) No. 6. May term, 1873. Supreme court of Pennsylvania, middle district. Samuel C. Cook, plaintiff in error, vs. Commonwealth, defendant in error. Filed in D. C. P., July 5, 1872. Writ of error to the court of common pleas for the county of Dauphin. Returnable the third Monday of May, 1873. Rule on the defendant in error to appear and plead on the return day of the writ.

"N. B.—20 days' notice to the parties or their counsel below is necessary to compel an appearance."

R. SNODGRASS, *Prothy.*

Filed in S. C., May 19, 1873.

BENJ. HARRIS BREWSTER.

20 Among the records and proceedings of the supreme court of Pennsylvania, sitting in and for the middle district, to No. 6 of May term, 1873, it is contained as follows:

Docket entries.

B. H. Brewster.
F. C. Brewster.

SAMUEL C. COOK
vs.
THE COMMONWEALTH OF PENNSYLVANIA. } 6. Writ of error to the court of common pleas of Dauphin County. No. 412. April term, 1871.

July 2, 1872. Præcipe for writ of error filed same day. Writ of error issued to the court of common pleas of Dauphin County. Returnable on the third Monday of May, 1873.

March 28, 1873. Assignment of errors filed.

May 19, 1873. Writ of error returned, with record from the court of common pleas of Dauphin Co.

May 20, 1873. Called for argument and argued.

And now, to wit, May 29, 1873—

Judgment affirmed. Per curiam.

January 6, 1874. Writ of error from the Supreme Court of the United States, & writ of error bond in the sum of $1,400, approved by Hon. Isaac G. Gordon, associate judge of the supreme court of Penna., received & filed. Same day copy of writ of error for defendant in error received. Same day citation to defendant in error with acceptance of service by attorney-general of Penna. received and filed.

Certified from the record.

[SEAL.] ROBT. SNODGRASS,
Prothonotary.

21 In the supreme court of Pennsylvania, middle district.

SAMUEL C. COOK, PLAINTIFF IN ERROR, & defendant below,
vs.
THE COMMONWEALTH OF PENNSYLVANIA, defendant in error, & plaintiff below.

Issue writ of error to the court of common pleas of Dauphin County to bring up the record and proceedings in a certain case depending thereon, to No. 412 of April term, 1871. Returnable to May term, 1873.

BENJAMIN HARRIS BREWSTER,
For Cooke.

June, 1872.

To the prothonotary of the supreme court, middle district.

Filed July 2, 1872.

22 S. C.—May term, 1873.

SAMUEL C. COOK
vs.
COMMONWEALTH OF PENNSYLVANIA. } 6.

Assignment of error.

The judgment of this case being upon facts agreed in the nature of a

special verdict, under sect. 51 of the rules of this court, it is agreed that—

1. The court erred in the judgment upon the case stated.

BENJAMIN HARRIS BREWSTER,
Of Counsel with Plff. in Error.

26 MARCH, '73.

Filed March 28, 1873.

23 *Judgment of the supreme court of Penna.—Entered May* 28, 1873.

And now, to wit, May 28, 1873, this cause came on to be heard, and on due consideration it is ordered that the judgment of the court below be affirmed.

Per curiam.

24 And now here, on this day, to wit, Jany. 6, 1874, the said Samuel C. Cook produced to the said supreme court of Pennsylvania here the of the United States of America, for the correcting of errors of and upon the premises, commanding the record & proceedings aforesaid, so as aforesaid rendered, with all things concerning the same, to be transmitted to the Supreme Court of the United States, to be held at the city of Washington, on the first Monday of December next, which writ of error is in the words and of the tenor following, to wit:

25 UNITED STATES,
Eastern District of Pennsylvania, set:

[SEAL.] The President of the United States to the judges of the supreme court of Pennsylvania, for the middle district, greeting:

Because that, in the record and process, and also in the rendering of judgment in a suit before you, between The Commonwealth of Pennsylvania, plaintiff, and Samuel C. Cook, defendant, in a plea of debt, a manifest error has entervened, to the great damage of the said Samuel C. Cook, as in their complaint has been stated; and, as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf: You are hereby commanded that if judgment thereof be given, then, under your seal, you do, distinctly and openly, send the record and process in the suit aforesaid, with all things concerning them and this writ, so that you have the same before the justices of the Supreme Court of the United States at Washington, District of Columbia, on the first Monday of December next, (1874,) that the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the honorable Nathan Clifford, associate justice of the Supreme Court of the United States, at Philadelphia, this twenty-seventh day of December, A. D. one thousand eight hundred and seventy-three, and in ninety-eighth year of the Independence of the said United States.

SAMUEL BELL,
Clerk Cir. Ct. U. S., E. D. of Pa.

Jany. 6, 1874. Filed in the office of the prothonotary of the supreme court of Pa., for the middle district.

26 In pursuance whereof, and according to the form and effect of the act of Congress in such case made and provided, a tran-

script of the record and proceedings of the judgment aforesaid, so as aforesaid rendered, with all things relating to the same, together with the said writ of error, are hereby transmitted to the said Supreme Court accordingly.

27 (Copy.)

Know all men by these presents that Samuel C. Cook and Leandro Cuesta Cook, of the city of Philadelphia, are held and firmly bound unto the State of Pennsylvania, in the sum of fourteen hundred dollars, to be paid to the said State, its certain attorney, or assigns, to which payment well and truly to be made the said Samuel C. Cook and Leandro Cuesta Cook do hereby bind themselves, their respective heirs, executors, and administrators, jointly and severally by these presents, sealed with their respective seals, this seventeenth day of December, A. D. 1873.

Whereas the said Samuel C. Cook sued out a writ of error from the Supreme Court of the United States, to reverse a judgment rendered in a suit in the supreme court of Pennsylvania, wherein the said Samuel C. Cook was plaintiff in error, and the said State of Pennsylvania defendant in error, the said suit being to No. 6 of the May term,
28 1873, of the said *su.* supreme court of the State of Pennsylvania, for the middle district:

Now the condition of the above obligation is such that if the said Samuel C. Cook, the plaintiff in error as aforesaid, shall prosecute the said writ of error with effect, and answer all damages and costs, if he shall fail to make good his plea, the above obligation shall be void; but otherwise shall remain in full force and virtue.

In witness whereof, the said Samuel C. Cook and Leandro Cuesta Cook have hereunto set their hands and seals the day and year aforesaid.

SAML. C. COOK. [SEAL.]
LEANDRO C. COOK. [SEAL.]

Sealed and delivered in the presence of us:
FRANK HENKELS.
JOHN J. TONER.

(Indorsed:) Samuel C. Cook, plaintiff in error, vs. The State of Pennsylvania, defendant in error. S. C. Bond of plff. in error.
Bond & sureties approved.

ISAAC G. GORDON.

Jany. 6, 1874. Filed in the office of the prothonotary of the supreme court of Pa. for the middle district. Benj. H. Brewster.

29 The United States of America to the State of Pennsylvania, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the first Monday of December (1874) next, pursuant to a writ of error, issued from the Supreme Court of the United States, to the supreme court of Pennsylvania, wherein Samuel C. Cook is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, viz, in a suit, No. 6

of the May term, 1873, (middle district,) of the supreme court of Pennsylvania, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Isaac G. Gordon, associate justice of the supreme court of Pennsylvania, this ninth day of December, A. D. 1873.

ISAAC G. GORDON.

30 Service of the within citation is hereby accepted.

SAMUEL E. DIMMICK,
Attorney-General, Coml. of Pennsylvania,
By LYMAN D. ELBERT,
Deputy Atty. Genl.

HARRISBURG, 30 *December*, 1873.

(Indorsed:) Samuel C. Cook, plaintiff in error, vs. The State of Pennsylvania, defendant in error. S. C. Citation. 1874, Jany. 6. Filed in the office of the prothonotary of the supreme court of Pa., for the middle district. B. H. Brewster, for plff. in error.

31 STATE OF PENNSYLVANIA, *ss:*

I, Robert Snodgrass, prothonotary of the supreme court of Pennsylvania, the highest court of law and equity in the State of Pennsylvania, in and for the middle district thereof, do hereby certify that the within & foregoing contained on pages one to twenty-nine, inclusive, is a full, true, & complete copy & transcript of the record and proceedings of the said supreme court, in the cause lately depending therein to No. 6 of the May term, 1873, middle district, wherein Samuel C. Cook was plaintiff in error, and The Commonwealth of Pennsylvania was defendant in error.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said supreme court, at Harrisburg, in said district, this 20th day of February, A. D. one thousand eight hundred & seventy-four.

[SEAL.]

ROBT. SNODGRASS,
Prothy. Sup. Ct. of Pa. Mid. Dist.

(Indorsement on cover:) No. 281. Samuel C. Cook, plaintiff in error, vs. The Commonwealth of Pennsylvania. Pennsylvania sup. court. Filed 1st October, 1874.

SUPREME COURT

OF THE

UNITED STATES.

No. 15.

SAMUEL C. COOK,
Plaintiff in Error,

versus

COMMONWEALTH OF PENNSYLVANIA,
Defendant in Error.

BRIEF OF COUNSEL FOR PLAINTIFF IN ERROR.

BENJAMIN HARRIS BREWSTER,
For Plaintiff in Error.

In the Supreme Court of the United States. No. 15.

SAMUEL C. COOK, *Plaintiff in Error,*	1874. No. 281.
vs.	October,
THE COMMONWEALTH OF PENNSYLVANIA, *Defendant in Error.*	1877. No. 15.

This is a writ of error to the Supreme Court of the State of Pennsylvania in the suit of

THE COMMONWEALTH OF PENNSYLVANIA	May Term,
vs.	1873.
SAMUEL C. COOK.	No. 6.

CASE STATED.

And now, January 27, A. D. 1872, it is hereby agreed by and between the parties to the above suit that the following case be stated for the opinion of the Court in the nature of a special verdict.

Paragraph 1. That the Commonwealth of Pennsylvania claims from Samuel C. Cook, an auctioneer duly appointed and commissioned by the Governor in and for the City of Philadelphia, the sum of $757.83 for taxes due at one-half of one per cent. and three-fourths of one per cent., as per his report furnished to the Auditor-General and settlement made by the Auditor-General and State Treasurer, dated January 3, 1871, *upon sales made by him*

of foreign goods placed in his hands by the importer, in bulk or original packages, to be sold at auction as an auctioneer in the original packages as imported, and which were so sold by him at auction as an auctioneer. The Commonwealth claims the said taxes under the Act of Assembly, entitled "An Act to Incorporate the Commercial Mutual Insurance Company, of Philadelphia, relative to the State duty on domestic and foreign articles in the Counties of Philadelphia and Allegheny, &c.," approved the 20th day of May, A. D. 1853, P. L. 1853, p. 669; and under the Act of Assembly, entitled "An Act to modify the existing laws of the Commonwealth, and to provide more effectually for the collection of the State tax or duty on auction sales in the City of Philadelphia and County of Allegheny," approved April 9, 1859, P. L. 1859, p. 435.

Paragraph 2. The defendant claims that said sales of foreign goods are exempt from taxation, because said Acts of Assembly, so far as they relate to such taxation, are in direct conflict with Sections 8 and 10 of Article I of the Constitution of the United States, and for that and other reasons void, and *inasmuch as the foreign goods so taxed as aforesaid were sold in bulk, as they were imported by the importer, said defendant, Cook, acted simply as his salesman.*

Paragraph 3. *That as the said goods had never been sold for consumption or resale by the importer, and had never been divided by him into smaller quantities by breaking up the casks or packages in which they were originally imported, the said goods had not lost their character as imports, and therefore that any such tax is unconstitutional and ought not to be levied.*

If the Court is of the opinion that the said Acts

of Assembly are constitutional then judgment to be entered for the Commonwealth, but if not, then judgment to be entered for the defendant, Cook. Costs to follow the judgment, and either party reserving the right to sue out a writ of error.

BENJAMIN HARRIS BREWSTER,
Of Counsel with SAMUEL C. COOK, *the Defendant.*

F. CARROL BREWSTER,
Attorney-General.

OPINION OF THE PRESIDENT JUDGE OF THE COURT OF COMMON PLEAS OF THE TWELFTH JUDICIAL DISTRICT OF PENNSYLVANIA.

THE COMMONWEALTH OF PENNSYLVANIA	412. April T.
vs.	1871.
SAMUEL C. COOK.	Stated Case.

By the Court. The case shows that the defendant was a commissioned auctioneer in the City of Philadelphia, and as such was charged with a tax on certain of his sales at the rate of $\frac{1}{2}$ and $\frac{3}{4}$ of one per cent., according to the kind of goods sold. The claim was settled by the accounting department of the State, under the Acts of the 20th of May, 1853, and the 9th of April, 1859, showing a balance due of unpaid taxes amounting to $757.83.

The defendant's excuse for non-payment is, that the sales were made for the importer of the goods, in the original packages, as brought in from foreign countries, and as the original importer could not be obliged to pay any tax had he sold the commodities himself, the defendant, as his auctioneer or salesman, cannot be assessed with this tax, and that the Acts of Assembly imposing it come in conflict with the Constitution of the United States, which prohibits any State from imposing a tax or duty on imports or exports. Ever since the decision of Brown *vs.* The State of Maryland, 12 Wheaton, 419, it has been considered the settled law of the land that no State can in any form impose a tax on the sales of the importer of foreign merchandize who disposes of his goods in the original bale or package; not on the sales,

for that would be an additional duty; nor on the goods themselves, for that would have the same effect; nor can it exact from him a license to sell, for that might be so high as to amount to a heavy burden or a prohibition. Possibly he might, in common with other citizens, be taxed on his net annual income. So soon as the goods have changed hands and gone into the common stock of the country, they are or their owner is subject to taxation in any of these forms; and so strictly has this principle been adhered to, that when the freight of a vessel was sold by the consignee before it was actually landed, the purchaser was not considered the original importer, but was obliged to take out a license to sell.—Waring *vs.* The Mayor, 8 Wallace, 110. And where a commodity is considered dangerous or injurious, the State could prohibit its sale as a police regulation. See 5 Wallace, 462, 479.

The assessment claimed in the present case is not from the original importer, but from the auctioneer employed to sell the goods.

By the laws of Pennsylvania no person can make sale of merchandize and certain other commodities, as an auctioneer within the city of Philadelphia, without giving adequate security, and obtaining a commission from the Governor for that purpose. He is also bound by law to pay a certain tax or duty on his sales into the State Treasury, and forfeits his commission by any neglect or refusal so to do. This was the law of the State long before the enactment of the two statutes referred to in the stated case, which merely increased the amount of said tax or duty on some kind of goods, and took it off of others. When the importer, instead of making sales himself, chooses to employ a State officer for that purpose,

who is obliged to pay a certain tax or commission on his sales, he himself would perhaps eventually be compelled to pay the same, at least he could not lend the immunity which he enjoyed as an importer to the auctioneer, and shield him from payment according to the terms of his commission. In the case of Nathans *vs.* The State of Louisiana, 8 Howard, 73, an auctioneer who dealt solely in foreign bills of exchange was held to be subject to State taxation, and it was there decided that the State has a right to tax its own citizens for the prosecution of any particular business or profession within the State. In Brown *vs.* The State of Maryland, already cited, Chief Justice Marshall says: "Auctioneers are persons licensed by the State, and if the importer chooses to employ them, he can as little object to paying for the service as for any other for which he may apply to an officer of the State. The right of sale may very well be annexed to importation without annexing to it also the privilege of using the officers licensed by the State to make sales in a particular way." We do not understand that any of our statutes impose the tax or duty on the owner of the goods, but on the auotioneer who is required to pay it into the State Treasury. It is true that this duty may increase the expense of sale to the owner of the goods, but that is because he chooses to employ a State officer to make it. If he would conduct the business himself that would be avoided, nor does the loss necessarily fall on the owner; it may only diminish the profits of the auctioneer, or increase the price to the purchaser. The case does not state on whom the duty must fall, nor does it show that it is customary to sell at auction in such cases. If the importing merchant expected immunity under the Federal Constitution the case should set forth that it was an established usage or custom, or that there was a pressing necessity to sell at auction.

We have been referred by the defendant's counsel to The People of New York *vs.* Waring, 3 Keyes, 374, a well-reasoned opinion by the New York Court of Appeals, to show that a tax cannot be imposed on the goods or sales of an importing merchant until the articles have gone into second hands. That case, however, at p. 376, shows pretty clearly that if the importer chooses to command the services of an auctioneer who is a State officer, he cannot object to paying the tax or duty on a sale so made; and a distinction is there taken between a sale by a broker or private agent and one by the auctioneer, a commissioned officer of the State.

We referred this case back after it was submitted to have the counsel agree as to whether it was necessary for the importer to sell through the medium of an auctioneer, or whether there was a settled custom or usage in the city to so make sales; but no change was made in the statement. We must therefore take it for granted that it was done for mere convenience. As we conceive the State can as well require the auctioneer to pay a tax on his sales, as pay for his commission or license, there is no constitutional distinction. It can also declare by law that he shall pay that tax on certain commodities and not on others. That he may sell all drugs, dye stuff and salt, *ad libitum*, but shall pay a duty on all sales of woolen, cotton or iron goods, or on groceries; as it creates the officer it can fix the terms of his being. No one is obliged to employ him, and if they do he must pay the tax on his sales, according to the terms of the law under which he holds his commission, whether that eventually falls on the seller, the purchaser, or himself. In no one of the cases decided is it said that a State cannot tax her own officers, whether they sell for others foreign or domestic goods. It is all a matter of State power and of

State policy. We are of the opinion that the department properly charged the auctioneer with this tax; that the laws under which it was assessed are constitutional, and we therefore give judgment in favor of the Commonwealth on the case as stated.

JNO. J. PEARSON,
President Judge of the Twelfth Judicial District of Penna.

The Supreme Court of Pennsylvania gave no written opinion, but made an order affirming the judgment of the court below. See Transcript of Record, page 2.

SAMUEL C. COOK	S. C.
vs.	May T., 1873.
COMMONWEALTH OF PENNSYLVANIA.	No. 6.

ASSIGNMENT OF ERROR.

The judgment in this case being upon facts agreed in the nature of a special verdict under Section 51 of the rules of this court, it is assigned that—

1. The court erred in the judgment upon the case stated.

BENJAMIN HARRIS BREWSTER,
For Plaintiff in Error.

26th March, 1873.

ARGUMENT.

The defendant in this case appeals from the imposition of a tax by the State upon his sales as an auctioneer of foreign or imported goods in the original packages and for the account of the importer, under the Act of 20th May, 1853, and 9th April, 1859, which follow:

The State *duty* to be paid on sales by auction in the counties of Philadelphia and Allegheny, shall be *on all domestic* articles and groceries *one-half of one* per cent.; *on foreign drugs, glass, earthenware, hides, marble-work and dye-woods, three-quarters of one per cent.*—Act 20th May, 1853, § 18.—P. L. 683.

Said auctioneers shall pay into the treasury of the Commonwealth *a tax or duty* of one-fourth of one per centum on all sales of loans or stocks, and shall also pay into the treasury aforesaid *a tax or duty*, as required by existing laws, on all other sales to be made as aforesaid, *except on groceries, goods, wares and merchandize of American growth or manufacture, real estate, shipping or live stock;* and it shall be the *duty of the auctioneer* having charge of such sales *to collect and pay over to the* State treasurer the said *duty or tax*, and give a true and correct account of the same quarterly, *under oath or affirmation*, in the form now required by law.—Act 9th April, 1859, § 6.—P. L. 436.

It is contended that as the goods thus sold have not lost their character as imports, this tax is actually a tax on imports, and in direct repugnance to two provisions of the Constitution of the United States:

1. To that which declares that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

2. To that which declares that Congress shall have power "to regulate commerce with foreign nations and among the several States, and with the Indian tribes."

It is laid down in Brown *vs.* State of Maryland, 12 Wheaton, 437, that:

"An impost or duty on imports is a custom or a tax levied on articles brought into a country, and is most usually secured before the importer is allowed to exercise his rights of ownership over them, because evasions

of the law can be prevented more certainly by executing it while the articles are in its custody. It would not, however, be less an impost or duty on the articles if it were to be levied on them after they were landed."

* * * * * * * *

"A duty on imports, then, is not merely a duty on the act of importation, but is a duty on the thing imported. It is not, taken in its literal sense, confined to a duty levied while the article is entering the country, but extends to a duty levied after it has entered the country."

And "imports" are explained to be "things imported,"—"the articles themselves which are brought into the country."—p. 437.

This definition being made, the court held that "while goods remain the property of the importer in the original form or package in which imported, a tax upon them is too plainly a duty on imports to escape the prohibition of the Constitution."—p. 441.

Chief Justice Taney, in the License Cases, 5 Howard, 575, says: "Goods imported, while they remain in the hands of the importer in the form in which they were brought into the country, can, in no just sense, be regarded as a part of that mass of property the State usually taxed for the support of the State government."

Mr. Justice Field, in Lowe *v.* Austin, 13 Wall. 29–35, among other things, says: "Goods imported, do not loose "their character as imports, and become incorporated "into the mass of property of the State, until they have "passed from the *control* of the importer, or been *broken* "*up* by him from their *original cases*."

In the present case the goods were sold in the original packages, as they were imported, on account of the importer, in his possession and in his storehouse, and had not changed their character, nor in any way become merged in the general mass of property in the State. The auctioneer was merely the salesman of the importer, and never had the possession of the goods or any part of them. And see case stated, 1st and 2d and 3d paragraphs.

In People *vs.* Maring, 3 Keyes, 374, the position of this plaintiff in error is expressly upheld.

This was an appeal from the Act of April 13, 1866, subjecting sales of foreign merchandize by brokers to taxation; and it was held that a State cannot impose a duty upon articles which have been imported for sale until the importer has either sold them or divided them into smaller quanties, by breaking up the casks, packages, &c., so as to destroy the character of import; and that until imports have passed into the general mass of property by being sold by the importer, either for consumption or resale, they retain their character as imports.

Per curiam. "Until the importer has so by sale or otherwise so acted upon the articles as to cause them to lose their character of imports, a State tax upon them would be in direct violation of the constitutional prohibition; and a tax upon their sale, if it were possible to regard it otherwise than as a tax upon the article itself, would be in derogation of the right to sell, which is an inseparable incident of the law permitting importation, and which the importer acquired by the payment of duties to the United States."

In the opinion of the Court in the case under argument, it is said that the assessment is claimed "not from the original importer, but from the auctioneer employed to sell the goods," and that by the laws of Pennsylvania an auctioneer must take out a commission and give security before he can act as such, and is bound also to pay a certain tax or duty on his sales, and that the importer, when he chooses to employ a State officer to make sales who is obliged to pay a certain tax or commission on his sales, cannot lend his immunity to an auctioneer.

The learned judge, to support this position, cites a dictum of Chief Justice Marshall in Brown *vs.* Maryland, which is as follows, p. 443:

"Auctioneers are persons licensed by the State, and if the importer chooses to employ them he can as little object to paying for this service as for any other for which he may apply to an officer of the State. The right of sale may very well be annexed to importation, without annexing to it, also, the privilege of using the officers licensed by the State to make sales in a peculiar way."

The whole tenor of the case, from which this extract comes, and the *dictum* itself, plainly shows, that if this *obiter dictum* has any weight it is only upon the question of the power of the State to require an auctioneer to *take out a license* before selling foreign goods, a power undoubtedly within the scope of the State as a tax upon a particular avocation for revenue, so long as no discrimination is made against foreign goods in the license law. The Chief Justice never contemplated such a tax as the one at present under consideration—a direct tax upon the sales of imported goods, and imposed on foreign goods only, *eo nomine*. He only intended to say that such goods

could not be sold at auction *by an unlicensed auctioneer, because they were foreign merchandize, in the hands of the importer.*

The importer *has already paid for the privilege of using a State officer, in bearing his proportion of the license fee, included in the commission paid by him for selling. Any further tax is an exaction and against the spirit and words of all the decisions.*

For by law in Pennsylvania, all auctioneers were in 1872 commissioned by the Governor, and classified into five classes, and each class paid a *license* fee and gave heavy bonds: 1st class $2000 *license* fee: 2nd class, $1500 *license* fee; 3d class, $1000 *license* fee; 4th class, $500 *license* fee; 5th class, $100 *license* fee. Pamphlet Laws, 9 April, 1859, 435. S. C. Cook was an auctioneer as appears by the case stated, duly appointed and commissioned of the first class, and as such paid a *license* fee of 2000 dollars, to make "sales by auction."

The importer indirectly pays for the privilege of using this State officer, as is above said. In addition to that under the statute here complained of, it is attempted to oblige him to pay "*a tax or duty*" on imported goods sold in bulk and in their original packages. (See case stated.)

In 15 Wallace, Mr. Justice Strong says, "a tax upon the occupation of a physician or an attorney measured by the income of his profession, or upon a banker graduated according to the amount of his discounts or deposits, will hardly be claimed to be a tax on his patients, clients, or customers, though the burthen ultimately falls upon them. It is not their money which is taken by the

Government. The law exacts nothing from them. *But when, as in the other case between these parties, a company is made an instrument by the law to collect the tax from the importers, when the statute plainly contemplates that the contribution is to come from them, it may properly be said they are the persons charged.*"

Such is this case, for here an auctioneer by the very terms of the statute is made an instrument "*to collect and pay over to the State Treasurer* the said duty or tax, to give a true and correct account of the same quarterly under oath or affirmation," Act, 9 April, 1859, § 9, P. L. 436. To collect from the importers.

This case of Brown *vs.* Maryland is full of dicta that support the position of plaintiff in error; pages 439, 440, 441, 443, 447, 448, are particularly rich in such.

The learned judge also cites Nathan *vs.* State of Louisiana, 8 Howard, 73, in support of his opinion on this point.

This case also applies only to the question of license, and does not touch the question of a tax upon imports, for it is held therein, p. 81, that bills of exchange are neither imports nor exports, and that a broker can be taxed by way of license, although dealing in foreign bills exclusively, and that is all this case rules. In the opinion of the Court, even here we find it upheld, "no State can tax an export or import as such, except under the limitations of the constitution; but before an article becomes an export, or after it ceases to be an import, *by being mixed with other property in the State*, it is a subject of taxation by the State."

The language of the Act of Assembly imposing the tax herein contested, fully answers the argument of the learned judge below upon this point. The auctioneer is commanded "to *collect and pay over* to the State Treasurer" "a *tax or duty*" upon all sales "except on groceries, &c., of *American growth or manufacture*," and is required to *make a return* of such duty so collected, under oath, to the Auditor General. This exaction is, therefore, a "*duty*," not upon the avocation of the auctioneer, but upon his sales of imported goods, eo nomine, and an impost falling directly upon all such goods sold, paid by the importer, from whose moneys it is deducted when the auctioneer makes his return of sales made, and accounts for the proceeds to the importer. Whether the imported goods sold bring cost price or more, still ths "duty" is deducted, and the burden is upon them, and the importer as their owner. The auctioneer collects the duty as the sworn officer of the State, and makes return to the State Treasurer. He is, de facto, the tax gatherer of the State, and upon the imported goods sold by him in the original packages as imported, he levies in the name of the State, an impost as direct as that collected by the United States collector of customs. He is made the agent of the State to intercept the mingling of such goods with the "general mass of property of the country." He "collects" by the authority of the State a duty upon the *first* sale of imports by the importer, before they are broken up, and under a law that aims directly at imports, and makes an exception in favor of goods of "American growth and manufacture." This cannot be done, and to claim such a power under the dictum of Chief Justice Marshall, in 12 Wheaton, 443, is to distort his words and to overrule the whole opinion by the force of a single phrase.

People *vs.* Maring, 3 Keyes, makes no such distinction

between selling by a private agent and by an auctioneer, as Judge Pierson cites; on the contrary, that case says, p. 376, that the question did not arise in the matter before the court.

The learned judge also says: "We do not understand that any law 'imposes' tax or duty on owners of goods, but on the auctioneer;" that the loss does not necessarily fall upon the owner, and that the case stated should set forth on whom the duty fell; and that it was necessary or an established custom to sell at auction if immunity from tax was expected under the Federal Constitution.

To this is answered that in Brown *v.* Maryland, 12 Wheaton, 440, the court said, "A duty on imports is a tax which is paid by the consumer," and it is submitted that the tax levied upon the auctioneer necessarily falls upon the consumer. Also that whether sale by auction was necessary or customary is immaterial, so long as such sale is made of the imports in the original packages and for account of importer, since the goods cannot lose their character as imports until sold by the importer "for consumption or resale," or the packages broken by him. *The goods do not pass into the "general mass of property" of the State until after the sale by the auctioneer, and are not taxable until then.*

The case of Waring *vs.* The Mayor, 8 Wallace, 110, cited by the learned judge of the court below, supports this doctrine strongly. We find therein, p. 122, cited from Brown *vs.* Maryland, "that the importer purchases, by payment of duty, a right to dispose of the merchandize as well as to bring it into the country, and a tax would intercept the import as an import in the way to become incorporated with the general mass of property, and would

deny it the privilege of becoming so incorporated until it should have contributed to the revenue of the State."

The tax complained of in the present case is odious for another reason. It discriminates against foreign goods, for which reason alone it should not be protected. In the Tonnage Tax cases, 12 P. F. Smith, 286, this discrimination is condemned, and the position of plaintiff in error abundantly supported.

Per curiam, p. 295: "The State in laying a common tax on all such articles is not bound and cannot be presumed to know where they will be consumed. * * * *If she do not discriminate between that which goes out or comes in, and that which remains within*, it cannot be said that she, in any sense, attempts to regulate commerce with other States, or to impose a duty on imports or exports.

The tax in the present case discriminates, and is therefore a duty on imports and an attempt to regulate foreign commerce.

On pages 294 and 296 of same cases we find this discrimination again frowned upon, and the doctrine of Brown *vs.* Maryland cited with approval.

And on 297, the Court, speaking of goods exported or in transit through the State, says:

"The subjects must not be singled out and taxed, for this would be discrimination affecting intercourse, invidious and inviting retaliation from other States or foreign powers."

This is the case that was cited and principally relied

upon by the commonwealth in the court below; and in their written argument the following passage was cited in full:

"There is, in fact and in authority, a substantial distinction between an act which simply operates as a burden on commerce and one which attempts to regulate it. No one can doubt the power of a State to tax her coal, iron, &c., &c., and the persons and occupations of those engaged in their production, &c., and yet these burdens fall on those who consume them."

Does not this contradict the words of Chief Justice Marshall in Brown *vs.* Maryland, 12 Wheaton, 439:

"No object of any description can be accomplished by laying a duty on importation which may not be accomplished with equal certainty by laying a duty on the thing imported in the hands of the importer. It is obvious that the same power which imposes a light duty can impose a very heavy one—one which amounts to a prohibition."

Thus does the United States Supreme Court deprecate the "burden on commerce" that the commonwealth would impose. As to the latter part of the extract from 12 Smith, concerning tax on coal and productions of the State, and upon the occupations of those producing them, it is not the intention to deny its force, but its application to the present case is not obvious, since we do not attempt to deny the power of a State to tax her domestic productions to any extent the legislature may choose, however hard the burden may be upon the consumer. But, according to Chief Justice Marshall, who says, 12 Wheaton, 440, "a duty upon imports is a tax on the ar-

ticle which falls on the consumer," and declares the inability of the State to impose such a duty; the consumer of foreign goods must not be so burdened nor commerce so regulated; and the exclusive right to tax such commodities is given by the Constitution to the United States as a means of revenue, and as a method of regulating by uniform laws our foreign commerce. To allow States, under any pretext, to invade this right, would be to destroy the revenue and create domestic discord, overthrow all equality and uniformity of commercial and international intercourse with foreign countries, and thus frustrate one of the main objects of our national compact.

In Pennsylvania R. R. *vs.* Commonwealth, 3 Grant, 130, also, discrimination against foreign goods is condemned and declared unconstitutional.

Pervear *vs.* The Commonwealth, 5 Wallace, 476, cited by the learned judge in his opinion, merely supports the right of a States to prohibit the sale of dangerous commodities as a police regulation. This is undoubted, and does not apply to the present case. There was no question there of taxing foreign goods or prohibiting their sale, as the goods in question were home-made.—p. 479. And the bias of the court upon a question like that in the present case is plainly shown on same page to be in favor of the position herein upheld.

The position of the learned judge in the court below, that the State may discriminate against certain goods, is not supported by the cases where that discrimination is against foreign goods, as all the decisions show. He says that "no one is obliged to employ the auctioneer." That is why the plaintiff in error complains. No one

will employ him if such taxes must be paid by them, and thus his business will be legislated out of existence.

It is not denied that a State can tax her own officers, whether they sell foreign or domestic goods, as the learned Judge lays down. The State may do so, has done so, in levying a license tax upon the auctioneer; thus she taxes her own officer and his occupation for revenue, and in a way that does not discriminate against foreign goods, and all alike must pay, in that way, for the privilege of employing a "State officer to sell in a peculiar way." But this is the limit of her power; here it ends. She has no right, under cover of taxing the occupation of her officer, to lay a direct tax upon imported goods as such; discriminating strongly against goods of that nature, as this obnoxious tax does.

The evils of supporting such a tax upon imports is fully set forth in the following passage from Brown *vs.* Maryland, 12 Wheaton, 447, "What would be the language of a foreign government, which should be informed that its merchants, after importing according to law, were forbidden to sell the merchandize imported? What answer would the United States give to the complaints and just reproaches to which such an extraordinary circumstance would expose them? No apology could be received or even offered. Such a state of things would break up commerce. It will not meet this argument to say that this state of things will never be produced; that the good sense of the States is a sufficient security against it." And on page 448 the court as strongly condemns any hindrance to the incorporation of imports "with the mass of property in the country." The court says, "such a state of things will break up commerce." This language is prophetic of the result in the city of Philadel-

phia; for, because of this law, men send their goods to New York for sale, where there is no such tax, and where the courts have decided there cannot be such a tax.

"Any charge on the introduction and incorporation of the articles into and with the mass of property in the country, must be hostile to the power given to Congress to regulate commerce, since an essential part of that regulation, and principal object of it, is to prescribe the regular means for accomplishing that introduction and incorporation."

Again we have recourse to the same case, and find in the words of Chief Justice Marshall, which follow, a complete summary and approval of the principle contended for here—p. 441:—

"It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has perhaps lost its distinctive character as an import, and has become subject to the taxing power of the State; but *while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported*, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution."

Every incident mentioned by the Chief Justice is found in this case. The goods sold by the auctioneer "remained the property of the importer, in his warehouse, in the original form or package," for it is the universal custom for the auctioneer to sell the goods by sample, the goods remain in the warehouse of the importer, and are delivered to the purchaser by the importer when sold upon

the order of the auctioneer. The importer never parts with them until then, and delivers them in same package and in same form in which they were landed from the vessel bringing them to the country. But even were the goods in the custody and care of an auctioneer, for sale by him as the salesman and warehouseman of importer, in the original package, would not the possession of the auctioneer be the possession of the importer? And it is clear that in employing an auctioneer to sell, as above, the importer has not "so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country," or "lost its distinctive character as an import." They command a market at the auction sale because they are foreign goods, and the purchaser has evidence of their real character, and that they are not spurious or adulterated, because the importer still owns them and holds them in their original packages, unbroken.

The Tonnage Tax cases, 12 P. F. Smith, have been considered by the United States Supreme Court and overruled by that tribunal. The judgment of the court is reported, Reading Railroad *vs.* Commonwealth of Pennsylvania, 15 Wall. 276, 292, and the principle contended for by defendant in error in this case again commented upon and affirmed. It is laid down there that a State tax is to be considered *not as to the form or agency through which collected, but by the subject upon which the burden is laid.* 15 Wallace, 272.

"It has repeatedly been held that the constitutionality or unconstitutionality of a State tax is to be determined, not by the form or agency through which it is to be collected, but by the subject upon which the burden is laid, This was decided in the cases of Bank of Commerce *vs.*

New York City, 2 Black, 620; in the Bank Tax case, 2 Wallace, 200; Society for Savings *v.* Coite, 6 Wall. 594; and Provident Bank *vs.* Massachusetts, 6 Wallace, 611. In all these cases it appeared that the bank was required by the statute to pay the tax, but the decisions turned upon the question, what was the subject of the tax? upon what did the burden really rest? not upon the question from whom the State exacted payment into its treasury. Hence, where it appeared that the ultimate burden rested upon the property of the bank invested in United States securities, it was held unconstitutional, but where it rested upon the franchise of the bank it was sustained." 15 Wallace, 272.

So when a tax upon imports is collected by an auctioneer the court will look beyond the pretext that it is a tax exacted from an "officer of the State" for exercising his avocation, and inquire as to the "subject where the burden is laid," and when, as in this case, the burden ultimately falls directly upon imports, as such, the tax cannot be sustained, and especially as above stated, when the tax discriminates directly against foreign goods. The imposition of the tax disputed here, is as burdensome as that condemned in this last cited decision, and the words of Strong, J., apply equally strongly to foreign commerce and to the danger attending the power to tax claimed under the laws in question here.

"The payment of that tax is a condition, upon which is made dependent the prosecution of this branch of commerce. And as there is no limit to the rate of taxation she may impose, if she can tax at all, it is obvious the condition may be made so onerous that an interchange of commodities with other States would be rendered impossible. The same power that may impose a tax of two cents per

ton upon coal, carried out of the State, may impose one of five dollars. Such an imposition, whether large or small, is a restraint of the privilege or right to have the subjects of commerce pass freely from one State to another without being obstructed by the intervention of State lines." 15 Wallace, 276.

Then, as to the position in opinion of the court below, that the State may exact payment for the privilege of employing her servant or creature to sell the goods, the words of Judge Strong are again cited, and the principle therein laid down it is claimed applies with the same force to the exaction the plaintiff in error seeks to avoid.

"We may notice here a position taken by the defendants in error, and stoutly defended in the argument, that the tax levied, instead of *being a regulation of commerce, is compensation for the use of the works of internal improvement* constructed under the authority of the State and *by virtue of franchises granted* by the State; in other words, that it is a toll for the use of the highways, a part of which, in right of her eminent domain, the State may order to be paid into her treasury. When in the hands of creatures exercising her franchises, what clause in any instrument forbids her to tax the franchises, and to authorize the tax to be added to existing tolls and franchises?

"That this argument rests upon a misconception of the statute is to our minds very evident. We concede the right and power of the State to tax the franchises of its corporations, and the right of the owners of artificial highways, whether such owners be the State or grantees of franchises from the State, to exact what they please for the use of their ways. That right is an attribute of ownership. But this tax is not laid upon the franchises

of the corporation, nor upon those who hold a part of the State's eminent domain. It is laid upon those who deal with the owners of the highways or means of conveyance." * * * * * * *

"The tax is not compensation for services rendered by her or by her agents. It is something beyond the cost of transportation or the ordinary charges therefor." * *

"But, in truth, the State has no more right to demand a portion of the tolls which the grantees of her franchises may exact, than she would have to demand a portion of the rents of land which she had sold. She may tax by virtue of her sovereignty, and measure the tax by income, but the income itself is beyond her reach." 15 Wallace, 277, 278.

Do not these extracts contradict and disaffirm the doctrine that the State may exact payment for the privilege of employing "a State officer to sell in a peculiar way?" Would not such a tax be laid not upon "the franchise" or privilege of an auctioneer to sell in a peculiar way, but upon "those who deal with the owner of that privilege" or right to sell in that "peculiar way?"

And is not this tax something beyond the cost of selling in that "peculiar way," "or the ordinary charges therefor?" Is it not a tax on a forbidden "subject,"—on a thing, not on an occupation."

In Reading R. R. *vs.* Commonwealth, 15 Wallace, 276–292, involving the question of constitutionality of tax on gross receipts of railroad companies, the Supreme Court of the United States again affirm the leading case upon the point in this case, Brown *vs.* Maryland, and cite also Waring *vs.* The Mayor, 8 Wallace, 122, and Pervear *vs.* The Commonwealth, 5 Wallace, 479, as recognizing the

same doctrine; and so the decisions to the latest moment lean decidedly to the position of this plaintiff in error; and the Commonwealth herself has added her own testimony to strengthen his case, by the Act of 19th May, 1871, reducing the tax upon foreign goods sold at auction to the same rate as that upon goods of American growth or manufacture, thus recognizing the illegality of such discrimination against imports as follows:

"That from and after the 1st day of December next,"
"the tax or duty payable by auctioneers upon sales of"
"goods, wares or merchandize of foreign growth or"
"manufacture, by virtue of any law of this Common-"
"wealth, shall be no greater than upon similar sales"
"of goods, wares or merchandize of American growth"
"or manufacture; and all former laws, or parts of"
"laws, at variance with this act shall be and are hereby"
"repealed. Act of 19th May, 1871, P. L. 270."

BENJAMIN HARRIS BREWSTER,
For Plaintiff in Error.

Supreme Court of the United States.

No. 15.

SAMUEL C. COOK,

PLAINTIFF IN ERROR,

versus

COMMONWEALTH OF PENNSYLVANIA,

DEFENDANT IN ERROR.

PAPER BOOK FOR DEFENDANT IN ERROR.

LYMAN D. GILBERT,
Deputy Attorney General

GEORGE LEAR,
Attorney General.

For Commonwealth of Pennsylvania.

In the Supreme Court of the United States.

NO. 15.

SAMUEL C. COOK, *Plaintiff in Error,* VERSUS COMMONWEALTH OF PENNSYLVANIA, *Defendant in Error.*	1874. No. 281. October, 1877. No. 15.

WRIT OF ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

BRIEF OF THE COMMONWEALTH OF PENNSYLVANIA.

This is an appeal by Samuel C. Cook from the judgment of the Supreme Court of Pennsylvania, affirming the right of the Commonwealth to impose a tax upon certain sales made by him as an auctioneer in the city of Philadelphia.

The question presented for the opinion of this Court arises in the following manner: The Governor of Pennsylvania granted the plaintiff in error a commission to make sales in the city of Philadelphia by auction or public outcry. The acts of Assembly under which the commission was granted, required the person receiving it to give bond, with proper securities, conditioned for the faithful performance of all duties required of him by law as an auctioneer,

to pay a fixed sum of money into the treasury of the State, and certain duties upon his sales, which are ascertained from the following acts of Assembly:

"The State duty to be paid on sales by auction in the counties of Philadelphia and Allegheny, shall be on all domestic articles and groceries, one half of one per cent.; on foreign drugs, glass, earthenware, hides, marble-work, and dye-woods, three quarters of one per cent."—Act 20th May, 1853, § 18.—P. L. 683.

"Said auctioneers shall pay into the treasury of the Commanwealth a tax or duty of one fourth of one per centum on all sales of loans or stocks, and shall also pay into the treasury aforesaid a tax or duty, as required by existing laws, on all other sales to be made as aforesaid, except on groceries, goods, wares, and merchandise of American growth or manufacture, real estate, shipping or live stock; and it shall be the duty of the auctioneer having charge of such sales, to collect and pay over to the State Treasurer the said duty or tax, and give a true and correct account of the same quarterly, under oath or affirmation, in the form now required by law."—Act 9th April, 1859, § 6.—P. L. 436.

The Plaintiff in Error refused to pay the tax or duty imposed by law upon the sales of foreign goods placed by the importer in his hands for sale at auction, in the original packages as they were imported.

The Court of Common Pleas of Dauphin county, in a suit brought by the Commonwealth to recover them, decided that upon the sales thus made the plaintiff in error was liable to taxation, and this decision having been affirmed by the Supreme Court of Pennsylvania, he has taken a writ of error from its decision to this Court.

ARGUMENT.

It will simplify the argument to admit at its outset that the power to regulate commerce with foreign nations, and to lay imposts or duties on imports, does not belong to any State, but has been exclusively reserved to Congress by the Constitution of the United States. That the foreign merchandise of an importer, until it has lost its character as imports, by sale or otherwise, is not subject to the laws of any State, except for the purposes of inspection and police. That the importer is not required to take out a license to sell, for the right to sell is included in the right to import. That he is not compelled to pay a tax upon his sales, for a tax upon his sales is a tax upon the articles sold. That every device to subject his foreign merchandise to the taxing power of the State, will be frustrated by the protection given him by the fundamental law of the nation.

The Commonwealth of Pennsylvania disputes none of these principles. Her claim antagonizes none of them. If it did, she would concede its hopelessness, and abandon it.

But this contention is not between the Commonwealth of Pennsylvania and an importer in respect to a tax on his imports, but between the Commonwealth and an auctioneer, in respect to a graduated tax imposed upon his sales. The auctioneer is not the owner of the foreign goods, or their importer, but only their paid salesman. He is an officer created and commissioned by the Commonwealth of Pennsylvania, and by virtue of his office he obtains the right, which otherwise he could not have, to sell the goods of all who employ him at auction or by public outcry. This right he receives exclusively from the Commonwealth of Pennsylvania, and without her authority he could not pursue his calling. It is discretionary with him to accept the office; and after he has accepted it, he is at liberty to take or decline offers of employment, as his judgment and interest dictate. The office is given and received upon conditions, one of which is that the officer shall pay to the

Commonwealth a graduated tax upon his sales. This is the language of the Acts of Assembly under which the present claim is made. It is true that section six of the act of 9 April, 1859, quoted at length on page second of this book, contains these words, upon which considerable stress has been laid:

"And it shall be the duty of the auctioneer having charge of such sales to collect and pay over to the State Treasurer the said duty, or tax, and give a true and correct account of the same quarterly, under oath or affirmation, in the form required by law."

But it will be observed that this is only a fraction of the section, and must be read in connection with that portion which precedes it. When so read, it will be seen that the taxes are imposed on all sales, except those specifically named, made by auctioneers, and that it is the duty of the auctioneers to pay them. In no part of the section, or of any law of the State, are auctioneers relieved from their payment. Nowhere does the Commonwealth look to the importer for their payment, and in no instance does the State exonerate the auctioneer from them because he had failed to collect them from the importer. If it had been the intention of the law to make him the mere collector for the State, then he would not have been chargeable where, without any fraud or negligence on his part, there had been a failure to collect them. But such is not the purpose of the law. The auctioneer is, at all times and under all circumstances, liable for these taxes to the State, without reference to his ability to obtain them from the importer. The language of the section gives him a remedy against the importer, so that he may enforce the contract he has made with him, but does not condition his liability to the Commonwealth upon the success of his litigation.

The tax in dispute was not imposed upon the Plaintiff in Error in his capacity as importer. It did not affect any foreign merchandise he might have brought within the State. In respect to that he is untaxed. Unlike the peddler, in Welton *vs.* Missouri, 1 Otto, 275, he was at liberty to bring within the limits of the Commonwealth the goods of other States, and to dispose of his own property, if it consisted of the growth product or manufactures of other

States, or of foreign merchandise in original packages, free of tax or duty. But when he follows the business of an auctioneer and not of an importer, the State exacts a tax of him. She says, if you make gain and profit by selling the goods of another at auction, or by public outcry, and follow that as a business, you shall be taxed upon the privilege I give of allowing you to do so. This, we say, is a condition which a State can attach to the acceptance and exercise of an office which she has created, and that the acceptance and exercise of the office constitute a contract to perform the condition upon which it was given, with which the Constitution of the United States does not interfere.

But if it be asserted that the tax or duty is not laid upon the auctioneer, but only upon the importer, that the importer pays it, and the auctioneer is merely its collector, we insist that the right of the Commonwealth to collect the tax cannot be successfully denied.

It will then be observed that it is made the duty of the auctioneer to collect the tax; that it is not averred and does no where appear that he did not collect it, and in the absence of averment, it is the legal presumption that he did what the law required him to do. What, now, is the position of the parties? An auctioneer has in his hands a sum of money, which he obtained for the State by virtue of his office as auctioneer. The office, he received upon the express condition he should collect this money, and pay it over to the Commonwealth. Whatever right the importer might have had to refuse to pay the tax, he has waived, and the auctioneer cannot avail himself of it. It was decided in Warign *vs.* The Mayor, 8 Wallace 110, that even the assignee of the unloaded cargo of a ship does not obtain the importer's immunity from taxation. So, in this instance, the auctioneer does not succeed to any defense which the importer might have made to the claim of the State. The demand is not made of him as importer, but as auctioneer, who, as the agent of the State, has received the tax in dispute. He is, therefore, the trustee of the Commonwealth, in respect to the money now in his hands, and from the discharge of his trust, to pay it to the State, this Court, we ~~respectively~~ respectfully submit, ought not to absolve him.

In either event the Commonwealth must recover. If the plaintiff in error has made the collection, he ought to pay the money he has received to the Commonwealth. If he has not made it, he has failed to perform what he agreed to do, and is answerable to the State for the violation of his contract.

But even if this tax had been laid directly upon the importer, which we expressly deny, the right of the Commonwealth to collect it, would, it is respectfully contended, be undoubted, and in support of the right we assert:

That no one can avail himself of the services of one of her officers, except upon such terms as she prescribes in creating the office.

If an auctioneer was an officer of the United States, Congress could prescribe his duties, the terms upon which his services should be obtained, and the consequences which follow his employment.

But an auctioneer is not a federal officer. His office is created by the statutes of the Commonwealth of Pennsylvania. She has invested it with privileges, and annexed to it responsibilities. She has directed that for the protection of those who employ an auctioneer, he should give bond, with sureties, to secure to those whose property is sold the proceeds of the sales. She has rendered auctioneers liable to criminal punishment for bidding, either directly or indirectly, at their own sales, to the disadvantage of their employers. In return for the privileges they enjoy of selling goods for all who choose to employ them, she requires that they shall pay a graduated tax upon the gross amount of their sales. The office of auctioneer is, therefore, one of State creation, and subject to State regulation.

If the Commonwealth of Pennsylvania had, at any time, declared that no importer should sell his foreign merchandise, except through the agency of an auctioneer, the law might be deemed unconstitutional, because it virtually taxed imports. But no such declaration has yet been made. The importer, like the citizen, is left free to decide in what manner his goods shall be sold. He is at liberty to dispose of his merchandise at wholesale or retail, and with or without the assistance of an auctioneer.

It is, therefore, submitted with confidence, that when an

importer of foreign merchandise, of his own will, and for his own advantage, avails himself of the services of an officer commissioned by the State, and of the security provided by the State for the fidelity of such officer, he cannot decline to pay the price fixed by the State for the use of such service and security. The statement of this proposition is, perhaps, its sufficient support. But it is believed that whatever authority exists upon the subject sustains it.

In the case of Brown *vs.* The State of Maryland, Mr. Chief Justice Marshall said:

"Auctioneers are persons licensed by the State, and if the importer chooses to employ them he can as little object to paying for the service as for any other for which he may apply to an officer of the State. The right of sale may very well be annexed to importation without annexing to it also the privilege of using the officers licensed by the State to make sales in a particular way."

It is true this is *dictum*, but it falls from a very high authority, and is sustained by the same reasoning upon which the decision in that case rests. This will appear from a consideration of the reason for the constitutional provisions above referred to. Their purpose was to prevent a State from intercepting by its tax laws the import, as an import, on its way to become incorporated with the general mass of property, and from denying it the privilege of becoming so incorporated until it had contributed to the revenue of the State. Their intention was to give to every importer the right to use the privilege he had purchased from the United States without also purchasing it from the State.

This, it is respectfully submitted, is their entire object and effect.

If this view of the Constitution be correct, it follows that whatever privileges the importer does not purchase from the United States, but obtains exclusively from a State, are subject to State regulation and taxation. If we separate the privileges which he purchases of the United States from those which he procures from the State, we can mark where Federal jurisdiction ends and that of the State begins. An importer obtains from the United States the right to bring foreign merchandise into any State free from

State taxation, and to sell it without paying any tax or license to the State. Upon none of these privileges is the tax in question laid by the Commonwealth of Pennsylvania. She asks no duty or tribute for their enjoyment.

But the importer did not and could not purchase from the United States the right to use the services of an officer of the Commonwealth to assist him in disposing of his foreign merchandise.

The creation of the office of auctioneer is exclusively a question for each State to decide for itself, and the measure of responsibility attached to the office, and the manner of its exercise, are matters of State policy, over which the United States has no control. If it were otherwise, each State might be compelled by the United States to appoint auctioneers, whose number and duties would be wholly regulated by Federal law. But it is respectfully urged that the control of a State over its internal affairs cannot be so seriously impaired.

If, then, the privilege of using an auctioneer, and enjoying the protection afforded by the security which the law exacts of him cannot be obtained by the importer from the United States, but only from each State, then the State has the right to ascertain and collect its own charge for the use of that privilege.

That is all the Commonwealth of Pennsylvania claims in this case.

It is true that the tax or duty which the State exacts of him may affect the price of foreign merchandise, but that is a consequence which follows many kinds of taxes, and is no reason to prevent their imposition. In Nathan *vs.* State of Louisiana, it was declared: "If this power of taxation by a State within its jurisdiction may be restricted beyond the limitations stated on the ground, that the tax may have some indirect bearing on foreign commerce, the resources of a State may be thereby essentially impaired. But State power does not rest on a basis so undefinable. Whatever exists within its territorial limits in the form of property, real or personal, with the exceptions stated, is subject to its laws, and also the numberless enterprises in which its citizens may be engaged. These are subjects of State regulation and State taxation."

In Reading Railroad Company *vs.* Pennsylvania, 15 Wallace, 284, this Court, in affirming the constitutionality of the tax on gross receipts of railroad companies, said: "Very manifestly it is a tax upon the railroad company, measured in amount by the extent of its business, or to the degree to which its franchise is exercised. That its ultimate effect may be to increase the cost of transportation, must be admitted. So it must be admitted that a tax upon any article of personal property, that may become a subject of commerce, or upon any instrument of commerce, affects commerce itself. If the tax be upon the instrument, such as a stage coach, a railroad car, or a canal or steamboat, its tendency is to increase the cost of transportation, still it is not a tax upon transportation, or upon commerce, and it has never been seriously doubted that such a tax may be laid."

If, then, the Commonwealth of Pennsylvania has the right to impose a tax for the use of a privilege she has granted to an importer to sell his foreign merchandise through the agency of an auctioneer, she can also decide the amount of the tax and the manner in which it shall be laid.

She can impose a fixed sum, or demand a graduated contribution, proportioned to the use of the privilege granted.

This is expressly decided in Reading Railroad Company *vs.* Commonwealth, 15 Wallace, 284, where it is declared: "No doubt every tax upon personal property, or upon occupations, business or franchises, effects, more or less, the subjects and the operations of commerce. Yet it is not everything that affects commerce that amounts to the regulation of it within the meaning of the Constitution. Taxation may be laid upon a valuation or may be an excise. The States are not obliged to impose a fixed sum, but they may demand a graduated contribution proportioned to the value of the privileges granted, or to the extent of their exercise, or to the results of such exercise. No mode of effecting this, and no forms of expressions which have not a meaning beyond this, can be regarded as violating the Constitution."

Minot *vs.* Railroad Company, 18 Wallace, 208.

Society for Savings *vs.* Coite, 6 Wallace, 594.

Provident Institution *vs.* Mass., 6 Ib., 611.

It is, therefore, respectfully submitted, that if the tax in dispute is laid by the Commonwealth of Pennsylvania upon the importer, it is imposed in consideration of the enjoyment of a privilege which she alone could grant; its amount is graduated according to the use of the privilege, and it is, therefore, in strict accord with the provisions of the Constitution of the United States.

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